

Idaho Public Utilities Commission

Case No. IPC-E-11-15, Order No. 32974

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Commission denies solar project complaints

The Idaho Public Utilities Commission today denied in part a petition for reconsideration filed by a solar project developer against Idaho Power Company, claiming the utility violated federal provisions that require it to buy energy from the proposed project near Grand View.

But the commission agreed to clarify an earlier order regarding a utility's obligations under federal law to buy power from renewable developers and what factors should be used in determining how the revenue from sales of green tags from those projects be apportioned.

The developer of Grand View PV Solar Two, LLC claimed it was willing and able to obligate itself to supply up to 20 average megawatts of power to Idaho Power in 2011 under the provisions of the federal Public Utility Regulatory Policies Act. PURPA, passed by Congress in 1978 to incent renewable energy development, requires utilities to buy energy from qualifying small renewable power projects at rates determined by state commissions or negotiated by the parties.

The developer of the Elmore County project claimed his project was ready to provide energy to Idaho Power, but would not do so unless Idaho Power agreed to disclaim any ownership of the green tags or Renewable Energy Credits (RECs) associated with the project. RECs are tradable environmental commodities, which represent proof that 1 megawatt-hour of electricity is generated from an eligible renewable energy resource.

At about the same time the Grand View project was in negotiation, the commission, Idaho utilities and several parties, including Grand View, were engaged in a separate docket to determine, among other issues, how RECs should be treated. That case ultimately determined that the ownership of RECs be split 50-50 between the utility and renewable energy providers for wind and solar projects that are 100 kilowatts or larger unless the parties mutually agree to treat RECs differently. Grand View, as a party to that concurrent case, did not contest that finding.

In the Grand View case, Idaho Power offered to divide REC ownership 50-50 or allow one party to take the RECs for the first 10 years of the contract and the other party taking ownership for the last 10 years. During the parties' negotiations in June and July 2011, Grand View initially indicated a

willingness to sign the contract and let the commission decide the REC issue. Idaho Power agreed to that, but counsel for Grand View ultimately rejected its own proposal. Instead, it filed a complaint in August 2011, asking the commission to order Idaho Power to remove the REC provision in the draft sales agreement and insert a clause requiring the utility to disclaim ownership of all RECs. In June 2012, the commission denied the Grand View complaint.

In March 2013, Grand View raised a new argument, claiming it had perfected a “legally enforceable obligation” sometime between the March 10, 2011 date that Idaho Power had forwarded a draft power purchase agreement to Grand View and the August 2, 2011 date it filed its first complaint. (To prevent utilities from circumventing the must-purchase PURPA provision by refusing or delaying to enter into contracts with renewable projects, the Federal Energy Regulatory Commission adopted the concept of a “legally enforceable obligation” under which a project may make a binding commitment to sell power to an electric utility. A LEO may be incurred before a PURPA contract is reduced to writing.)

Grand View claimed Idaho Power was actively preventing the parties from executing the contract by insisting on REC terms it knew were objectionable.

In October 2013, the commission rejected Grand View’s REC and LEO arguments, stating that a LEO cannot exist when a project has not unconditionally obligated itself to provide power and Grand View would not do so unless Idaho Power disclaimed any ownership to RECs. Grand View asserted throughout the case that revenue from REC sales are key to the project’s financial viability and that without the revenue from the RECs, the project was not ready to sell energy to Idaho Power. Further, the commission noted, Grand View interpreted a March 2011 draft power purchase agreement as the establishment of a LEO, even though Grand View’s initial complaint and amended complaint against Idaho Power didn’t even mention a LEO. Grand View first advocated it had perfected a LEO in March 2013, some 19 months after it filed its complaint.

In November 2013, Grand View petitioned for reconsideration alleging the commission failed to recognize that a LEO and a PURPA contract are not the same and that the commission was inappropriately requiring Grand View to enter into a signed contract as a condition for a LEO. Grand View also alleged the commission impermissibly tied the creation of a LEO to resolution of the REC issue and that the commission’s decision regarding the 50-50 split of REC’s constitutes “retroactive ratemaking.”

The commission said it has indicated on many occasions that a LEO and PURPA contract are not the same and that there are two methods under which a project can provide power to utilities: entering into a signed contract or pursuing a legally enforceable obligation. However, the commission reiterated that Grand View’s purported LEO “was not a binding offer” but was

conditioned on Idaho Power disclaiming ownership of RECs. The commission clarified its previous final order to state that Grand View's insistence on REC ownership left the project unwilling to enter into a PURPA contract and that under the separate LEO issue, Grand View was not willing to unconditionally obligate itself to supply power to the utility.

Regarding Grand View's second complaint that the commission was tying the LEO and REC issues together, the commission said the specifics of this particular case intertwine the issues.

"We recognize that REC issues and LEO issues may be separate and distinct. However in this case the two issues are intertwined," the commission said, because Grand View's purported LEO was conditioned upon it receiving ownership of all the RECs. The commission's previous order was clarified to read, "Consequently, we conclude that although the REC and LEO issues are two separate and distinct issues, they are intertwined in this particular case."

Regarding the commission's decision in a separate case to split RECs 50-50 when parties cannot agree, the commission said there were two reasons for dividing REC ownership and Grand View ignored the first reason, namely that Idaho Power and its ratepayers have a property interest in the RECs from the renewable projects.

PURPA compels utilities to purchase qualifying renewable project output whether it needs the power to serve load or not. Ratepayers ultimately pay for the projects, the commission noted, and thus have a vested interest in the RECs that result from the projects. The commission did agree to clarify its earlier orders to consistently apply these property interest factors to conclude that REC ownership should be divided between parties.

The commission further ruled that its order is not retroactive because nothing prevents the PUC, in its quasi-judicial capacity, from acting retroactively to determine the rights of parties. This case was not a legislative one that sets rules dealing with what the law will be, the commission said, but an adjudicative one to determine the rights of parties based on what the law was.

Finally, the commission rejected Grand View's argument that its decision to split REC ownership was an unconstitutional impairment of contract because the parties did not enter into either a contract or a legally enforceable obligation.

The commission's order is final. Any party aggrieved by this order or other orders relating to this case may appeal to the state Supreme Court. A copy of the order as well as to Order No. 32913 which contains the changes made to previous orders are available on the commission's Web site at www.puc.idaho.gov. Click on "Open Cases" under the Electric heading and scroll down to Case No. IPC-E-11-15.